

United Brotherhood of Carpenters & Joiners of America, Local 210 Western Connecticut, AFL-CIO and Component Assemblies Systems, Inc. and Local No. 38, Sheet Metal Workers International Association, AFL-CIO. Case 34-CD-54

October 28, 1998

**DECISION AND DETERMINATION OF DISPUTE
BY MEMBERS FOX, LIEBMAN, AND HURTGEN**

The charge in this Section 10(k) proceeding was filed December 11, 1996, alleging that the Respondent, United Brotherhood of Carpenters & Joiners of America, Local 210, Western Connecticut, AFL-CIO, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Component Assemblies Systems, Inc. to assign certain work to employees it represents rather than to employees represented by Local No. 38, Sheet Metal Workers International Association, AFL-CIO. The hearing was held January 14, 1997, before Hearing Officer Michael C. Cass.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer, a New York corporation with its principal place of business located in Pelham, New York, is engaged in providing various construction services including mill work, metal stud installation, framing, blocking, and drywall installation. During the past 12 months the Employer has performed services outside the State of New York valued in excess of \$50,000 and during the same time period purchased and received at its Pelham, New York facility and other New York jobsites products, goods and materials valued in excess of \$50,000 that were shipped directly from points outside the State of New York. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Carpenters Union Local 210 and the Sheet Metal Workers Union Local 38 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

Turner Construction is the construction manager for the Swiss Bank project. Turner Construction subcontracted to the Charging Party, Component Assemblies Systems, Inc. (CAS or the Employer), the work of erecting metal stud and drywall interior walls inside the office building. CAS has a collective-bargaining agreement with the Respondent Carpenters Union Local 210. Since work began, CAS has used Carpenters Union Local 210 carpenters to perform the above-described work.

In about October 1996, CAS began installing the walls in the building's data processing room, where the Swiss

Bank's computer system will be located. To avoid radio wave interference with the computer system, the walls of the data processing room contain sheet metal shielding. The construction of the walls takes place as follows: first, metal shielding is attached directly to the metal wall studs; then two layers of drywall are attached to the wall overlaying the sheet metal.

In October 1996, Sheet Metal Workers Local 38 sought to obtain the metal shielding installation work for employees it represents. Local 38 brought its demand to a jurisdictional dispute board which had been established under a "Project Stabilization Agreement" for the Swiss Bank Project. The Charging Party Employer and the Respondent Carpenters Union Local 210 are not signatories to the "Project Stabilization Agreement."

On November 1, 1996, the jurisdictional dispute board held a hearing on Local 38's demand. Neither the Charging Party Employer nor the Respondent Carpenters Union attended the hearing; both assert that they failed to receive notice of the proceeding. On November 7, 1996, the board issued its decision awarding the installation of the sheet metal shielding to Sheet Metal Workers Local 38.

Upon learning of the dispute board's ruling, Turner Construction's project manager, Gregg D. Scholler, advised CAS to contact Local 38 and arrange to supplement its crew with employees represented by Sheet Metal Workers. In addition, on about November 8, 1996, a group of various unions' business agents representing the dispute board visited CAS Project Manager Jerome Pagano and told him about the board's ruling. At the close of business that day, CAS ceased work on the project. Thereafter, CAS sought cost estimates of employing Sheet Metal Workers to complete the work. On about December 5, 1996, Respondent Carpenters Union Local 210 Business Agent Richard Warga told Pagano and CAS Foreman Vinny Nitopi that the carpenters would "walk" off the job or "leave the job site" if the sheet metal installation work was assigned to anyone other than Carpenters-represented employees. Rather than hiring a supplemental crew represented by Sheet Metal Workers Local 38, however, CAS chose to pursue the instant charge.

Pending resolution of the dispute, no further work was done on the project. At the time of the hearing, the work was approximately two-thirds complete, with an estimated 2 to 3 days of work remaining. Because so little work remained, the Charging Party foresaw no layoffs of carpenters should the award go to Local 38.

B. Work in Dispute

The disputed work, called metal blocking, involves the installation of sheets of galvanized sheet metal onto metal studs which support the walls of the data processing room located on the fifth floor of a building which is

a part of the Swiss Bank jobsite in Stamford, Connecticut.

C. Contentions of the Parties

The Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the disputed work should be assigned to employees represented by the Carpenters Union Local 210.

Carpenters Union Local 210 acknowledges that it violated Section 8(b)(4)(D) by virtue of its representative threatening to pull all the carpenters off the Swiss Bank job if CAS reassigns the metal blocking work to the Sheet Metal Workers. In addition, Carpenters Local 210 states that it is neither signatory to nor by any other means bound by the Project Stabilization Agreement and its jurisdictional dispute resolution language.

Sheet Metal Workers Local 38 contends that all parties are bound by the dispute resolution mechanism set forth in the Project Stabilization Agreement and the dispute board's decision awarding the work to the Sheet Metal Workers. It notes first that the Fairfield County Building and Construction Trades Council is signatory to that agreement and Carpenters Union Local 210, by virtue of its affiliation with that entity, is bound. Similarly, because the project's general contractor, Turner Construction, signed the agreement, its subcontractor, CAS, is derivatively bound to its terms.¹

D. Applicability of the Statute

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there is reasonable cause to believe that a union has threatened to use or has used proscribed means to force an employer to assign work to one group of employees rather than to another and that the parties have no agreed-upon method for voluntary adjustment of the dispute.

As described above, both the Respondent Carpenters Union Local 210 and the Sheet Metal Workers Union Local 38 claim the work in dispute.² Further, the Car-

penters Union threatened the Charging Party Employer that it would "walk" or "leave the jobsite" if the disputed work were being performed by anyone other than Carpenters-represented employees. We conclude that there are active competing claims to the work and that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. *Operating Engineers Local 18*, 264 NLRB 858 (1982).

Sheet Metal Workers Local 38 is one of several construction trades unions which signed the Swiss Bank Project Stabilization Agreement. CAS and Carpenters Union Local 210 however, are not signatory to the Project Stabilization Agreement, did not agree to be bound by its terms, were not notified of the hearing regarding the Sheet Metal Workers claim to the disputed work, and did not participate in that hearing. Accordingly, we find that there is no method for the voluntary adjustment of the dispute to which all parties are bound.

Based on the above, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreement

There is no Board certification involving the work in dispute.

The Employer and Carpenters Union Local 210 have a long-established collective-bargaining relationship and are parties to a current collective-bargaining agreement. Article 13 of the parties' current contract sets forth the Carpenters' jurisdiction and, at least arguably covers the disputed work. The Employer has no collective bargaining agreement with the Sheet Metal Workers Local 38. This factor favors awarding the work in dispute to employees represented by the Carpenters Union.

2. Employer assignment and preference

The Employer assigned the work to employees represented by Carpenters Union Local 210 and prefers that the work in dispute be completed by them. This factor favors awarding the work in dispute to employees represented by the Carpenters Union.

these circumstances, we think it clear that Sheet Metal Workers has claimed the work.

Member Hurtgen agrees that *Capitol Drilling* is distinguishable and does not pass on the validity of that case.

¹ We note that Sheet Metal Workers Local 38 does not argue that it is not making a claim for the work within the meaning of Sec. 8(b)(4)(D). Our dissenting colleague raises this defense sua sponte.

² Despite our colleague's characterization of the Sheet Metal Worker's pursuit of the disputed work as failing to establish a cognizable "competing claim," we note that Sheet Metal Workers does not make this claim. It has not disclaimed interest in the work, has participated fully in this proceeding, and asserts that the work should be assigned in its favor. Moreover, we find the dissent extends, and therefore misapplies, the holding in *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995). In *Capitol Drilling* the union simply pursued a claim of breach of contract, based on the general contractor's union-signatory subcontracting clause. By contrast, in the instant case, Sheet Metal Workers has invoked the jurisdictional dispute mechanism of the general contractor's contract in order to obtain a work assignment from CAS. Consistent with this, as noted above, Sheet Metal Workers appeared at the hearing in this case and continued to seek the work. In

3. Employer past practice

The Employer has a practice of using carpenters to perform similar work on other projects. This factor favors awarding the work in dispute to employees represented by the Carpenters Union.

4. Area and industry practice

Both Unions introduced evidence of area and industry practice that each claims supports awarding the disputed work to the employees each represents. Accordingly, this factor does not favor awarding the work in dispute to either group of employees.

5. Relative skills

Both Unions presented evidence that the employees they represent are qualified to perform the disputed work. This factor does not favor awarding the work in dispute to either group of employees.

6. Economy and efficiency of operations

The disputed work has been performed by two-person carpenter teams, as part of an overall wall construction process which includes affixing drywall after the metal blocking is completed. If sheet metal workers were assigned the disputed work, carpenters would begin the process, sheet metal workers would then install the metal sheeting, and thereafter carpenters would return to the site to finish the job by hanging drywall. The interruption of the work process by having different work teams perform different phases of the job would undermine efficiency and productivity. Accordingly, this factor favors awarding the work in dispute to employees represented by the Carpenters Union.

CONCLUSION

After considering all the relevant factors, we conclude that employees represented by United Brotherhood of Carpenters & Joiners of America, Local 210, Western Connecticut, AFL-CIO, are entitled to perform the work in dispute. We reach this conclusion relying on employer preference and assignment, past practice, collective-bargaining agreement, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by the Carpenters, not to that union or to its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Component Assemblies Systems, Inc., represented by United Brotherhood of Carpenters & Joiners of America, Local 210, Western Connecticut, AFL-CIO are entitled to perform the work of installing metal sheets onto metal studs at the Swiss Bank jobsite in Stamford, Connecticut.

MEMBER FOX dissenting.

Unlike my colleagues, I would quash the notice of hearing in this proceeding, as failing to set forth an element essential to a finding of reasonable cause to believe that Section 8(b)(4)(D) has been violated. I find that the facts of this case are sufficiently similar to those in *Laborers (Capitol Drilling)*, 318 NLRB 809 (1995), to require the same result and that Sheet Metal Workers Local 38 has not made a competing claim for the work at issue.

Turner Construction, the general contractor of the Swiss Bank project, signed a "Project Stabilization Agreement" (PSA) in which it agreed that it, and its subcontractors, would abide by the terms of the PSA in resolving any jurisdictional dispute. Also signatory to the PSA is the Fairfield County Building and Construction Trades Council, on behalf of its affiliated local unions, as well as 13 individual labor organizations, including Sheet Metal Workers, Local 38. The PSA sets forth a detailed jurisdictional dispute procedure, involving submission of such disputes to a five-member panel of the Building Trades Council.

Turner subcontracted the work of erecting metal stud and drywall interior walls in the bank project to Component Assemblies Systems, Inc. (CAS or the Employer). CAS began work in April 1996,¹ using employees represented by Carpenters Local 210 with which it has a collective-bargaining agreement. During October, CAS began constructing the walls for the data processing room. To prevent radio wave interference with equipment to be housed in that area, it is necessary to attach metal shielding directly onto the studs prior to the installation of drywall. Upon learning that the Carpenters-represented employees were installing the metal shields, Sheet Metal Workers Local 38, following the procedures set forth in the PSA, brought the matter to the dispute resolution board. There is no evidence or allegation that Local 38 contacted either CAS or Carpenters Local 210 regarding this matter.

On November 1, pursuant to the procedures of the PSA, the dispute resolution panel held a hearing and decided that the work of installing the metal shields on the wall studs of the data processing room belonged to the Sheet Metal Workers. The next day, Turner's project manager, Scholler, accompanied by representatives of several building trades unions,² visited CAS field representative (Pagano), advised him of the panel's award, told him to stop the work, and to complete the job using sheet metal workers. CAS stopped work in the data processing area, investigated employing sheet metal workers for the job, and, when the Carpenters threatened to cease work entirely if the work was reassigned, filed the instant charge.

¹ All dates refer to 1996.

² This group did not include a representative from Sheet Metal Workers Local 38.

In *Capitol Drilling*, the Board stated that in order to find reasonable cause to believe that Section 8(b)(4)(D) has been violated, two requirements must be satisfied. There must be reasonable cause to believe (1) that a party has used proscribed means to enforce its claim to the work in dispute and (2) that there are competing claims to the disputed work between rival groups of employees. The Board held in that case that a union's effort to enforce a lawful union signatory subcontracting clause against a general contractor through a grievance, arbitration, or a court action "does not constitute a claim to the subcontractor for the work, provided that the union does not seek to enforce its position by engaging in or encouraging strikes, picketing, or boycotts or by threatening such action."³ Thus, even where one union has made an unlawful threat to enforce its claim to the work, as long as all the other union has done is seek to enforce its contractual rights against the general, there are not "competing claims" to the work and the second prong is not satisfied.

In *Capitol Drilling* the general contractor made a contractual commitment to subcontract work only in accordance with a union signatory subcontracting clause. In this case the general contractor made a contractual commitment to abide by a particular jurisdictional dispute resolution mechanism, and to require its subcontractors to abide by it as well. In both situations, the aggrieved

union brought its complaint to the general contractor, the entity which had failed to comply with its voluntarily-entered agreement, not to the subcontractor. In both cases, the complaining unions were seeking merely to enforce lawful contractual provisions. As the Board stated in *Capitol Drilling*, "If we permit Section 10(k) to defeat a collective bargaining representative's peaceful efforts at enforcing a proviso-protected subcontracting clause through proper arbitral and judicial channels, when that representative has never approached any employer about the work in question other than the one with which it has subcontracted, and has never engaged in coercion or threats of coercion relating to the work, then we are effectively thwarting the congressional intent underlying the 8(e) construction industry provision."⁴ For the same reasons, Section 10(k) should not be used to defeat a collective-bargaining representative's peaceful efforts at enforcing a voluntarily agreed-upon contractual mechanism for resolving jurisdictional disputes through proper grievance channels.

Accordingly, I find that by following the voluntarily-entered, contractually prescribed method of resolving a jurisdictional dispute between itself and the general contractor, Sheet Metal Workers Local 38 was not making a "competing claim" for the work within the meaning of Section 8(b)(4)(D) of the Act and that the notice of hearing should be quashed.

³ *Capitol Drilling*, supra at 810.

⁴ *Id.*, at 811.